



**Australian Finance Conference** ABN 13 000 493 907 Level 8, 39 Martin Place, Sydney, 2000  
Telephone: (02) 9231-5877 Facsimile: (02) 9232-5647 e-mail: [afc@afc.asn.au](mailto:afc@afc.asn.au) [www.afc.asn.au](http://www.afc.asn.au)

24 April 2017

Mr James Mason  
Financial Systems Division  
The Treasury  
PARKES ACT 2600

By email to: [insolvency@treasury.gov.au](mailto:insolvency@treasury.gov.au)

## **Exposure Draft Legislation – Improving Corporate Insolvency Law**

Dear Mr Mason

Thank you for the opportunity to comment on the draft exposure legislation, *Treasury Laws Amendments (2017 Enterprise Incentives No. 2) Bill 2017* (the Bill).

### **Background**

This submission is made on behalf of the Australian Finance Conference (AFC) and its Affiliated Associations; the Australian Equipment Lessors Association (AELA), the Australian Fleet Lessors Association (AFLA) and the Debtor and Invoice Finance Association (DIFA), collectively representing more than 100 Members. AFC Members include finance companies, specialist equipment financiers and general financiers providing consumer, commercial (including small business) and wholesale credit facilities, as well as listed and customer-owned banks, and credit reporting bureaux. AELA Members focus on providing commercial equipment financing products to the small business and broader commercial sector. AFLA Members provide vehicle fleet leasing, rental and management services. DIFA Members provide cash flow finance facilities under which suppliers assign the rights of unpaid invoices in return for immediate payment to business customers (particularly small business entities).

### **AFC Position**

The AFC supports the Government's intent to promote a culture of entrepreneurship and innovation including in relation to its policy position for proposed reforms of the corporate insolvency laws. This creates the potential for significant economic growth for the shared benefit of government, industry and customers. These laws are of key relevance to our Members in their dealings with commercial customers and support the recovery of outstanding debts owed to them in a timely, efficient and equitable manner; outcomes that operate to the benefit of customer, financier and shareholders alike. We have been pleased to have participated in the earlier consultation and acknowledge efforts of the Government to revisit areas to address a number of concerns identified by the AFC and other key stakeholders.

Following review, there remains one key area of concern relating to the proposed *Ipso Facto Clause*. We offer the following views designed to improve the operation of the Bill and avoid unintended consequences that may compromise the commercial interests of our Members in future insolvency proceedings and potentially undermine the Government's policy objective.

### **Key Concern: Ipso Facto Clause**

At the general level, the AFC reiterates concern raised in our earlier submission relating to the lack of an identified basis to support the need to provide protection through inclusion of

ipso facto clauses as a way of delivering on the Government's policy objectives. However, we acknowledge and support an approach that sees the provision operate to stay enforcement rather than act as an outright prohibition. The stay approach represents a practical compromise with respect to this matter. An ipso facto provision that operated as a blanket prohibition would, in our view, be entirely inappropriate and expose our Members and other providers of finance to corporate customers to real and material commercial detriment.

More specific concerns follow:

### **Payments for property used or occupied by, or in the possession of, the company**

Although lessors are currently subject to a stay on repossession, an administrator of a company will be personally liable for rent and other amounts for leased plant and equipment during the administration period, unless they give a notice under s443B of the Corporations Act (the Act) within the statutory decision period.

This provision is critical in encouraging administrators to make timely decisions about the future use and management of plant and equipment, thereby reducing the physical and financial risk to these assets that are generally financed by our Members through lease arrangements. For this reason, we contend that the provisions of s443B must still operate independently of the proposed amendments, and that the Bill clearly reflects this position.

The AFC submits that s451E of the Bill be amended to make it clear that an administrator must in any event give notice under s443B of the Act in respect of property used, occupied by, or in the possession of the company under administration, or be personally liable for ongoing rent and related costs.

We believe this is a measured approach that can be achieved relatively easy through the drafting process, and will bring certainty to all market participants.

### **Appointment of receivers**

We understand that the Bill does not seek to limit the ability of a secured party holding security over all, or substantially all, of the assets and undertakings of a company to appoint a receiver once an administrator has been formally appointed.

To provide comfort to our Members, we believe it is appropriate that the Bill be amended to make it explicit that the appointment of receivers will continue to be permitted under the existing sections of the Act.

### **Stay on company's right to additional credit**

To protect the financial interests of our Members and to avoid confusion, we contend s451E (6) of the Bill be amended to explicitly note that it applies to "any additional credit", and therefore captures any further credit drawings, regardless of whether they related to existing or proposed lines of credits.

### **Other comments**

The AFC supports the proposed list of contract types to be excluded from the stay on ipso facto clauses. We submit that the provisions of the Bill should not commence before the regulation prescribing this list comes into effect. The provisions to update

this list, through regulation or ministerial determination, are necessary and appropriate to ensure insolvency laws keep pace with the development of future financial products and services in a timely manner.

The AFC will continue to liaise with our Members to understand how from an operational perspective the new provisions, once implemented, impact their ability to appropriately and prudently protect their financial interests. And where material concern is identified, will re-engage with Treasury.

And as a final recommendation designed to future proof and ensure these reforms are delivering the Government's policy objectives without compromising the commercial interests of our Members and putting at risk access and adding cost to commercial finance, we suggest a statutory review be undertaken within three years of the commencement of their operation.

If you would like to discuss any aspect of this submission, please contact me [helen@afc.asn.au](mailto:helen@afc.asn.au) or James Aliferis, Associate Director – Policy [james@afc.asn.au](mailto:james@afc.asn.au) or either on 02 9231 5877.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Helen M. Gordon', with a horizontal line underneath.

Helen Gordon  
Executive Director

Attachment:

Membership lists



## AFC MEMBER COMPANIES

Allied Credit	Nissan Financial Services
American Express	nlc Pty Ltd
ANZ	Once Australia t/as My Buy
Automotive Financial Services	On Deck Capital
Bank of China	PACCAR Financial
Bank of Melbourne	Pepper Australia Pty Ltd
Bank of Queensland	Qudos Bank
BMW Australia Finance	RABO Equipment Finance
Branded Financial Services	RAC Finance
Capital Finance Australia	RACV Finance
Caterpillar Financial Australia	Ricoh Finance
Classic Funding Group	Selfco Leasing
CNH Industrial	Service Finance Corporation
Commonwealth Bank of Australia	Sharp Finance
Credit Corp Group	St. George Bank
Custom Fleet	Suncorp
De Lage Landen	Suttons Motors
Dun & Bradstreet	Thorn Group/Radio Rentals
Eclix Group	TL Rentals
Experian Asia Pacific	Toyota Financial Services
Finance One	Veda
FlexFleet	Volkswagen Financial Services
FlexiGroup	Volvo Finance
Genworth	Walker Stores
Group and General Finance	Wells Fargo International
HP Financial Services	Westlawn Finance
Indigenous Business Australia	Westpac
John Deere Financial	WEX Australia
Komatsu Corporate Finance	Wingate Consumer Finance
Kubota Australia Finance	Yamaha Finance
Latitude Financial Services	
Leasewise Australia	<u>Professional Associate Members:</u>
Liberty Financial	CHP Consulting
Lombard Finance	Clayton Utz
Macquarie Equipment Rentals	Credit Sense Australia
Macquarie Leasing	Dibbs Barker
Max Recovery Australia	Henry Davis York
McMillian Shakespeare Group	Sofico Services
ME Bank	White Clarke
Mercedes-Benz Financial Services	December 2016
MetroFinance	



AUSTRALIAN EQUIPMENT  
LESSORS ASSOCIATION  
Incorporated ABN 19 054 908 520

Level 8, 39 Martin Place  
Sydney 2000

Telephone – (02) 9231 5479  
Facsimile – (02) 9232 5647  
Website – [www.aela.asn.au/](http://www.aela.asn.au/)

## **AELA MEMBER COMPANIES**

255 Finance	International Decision Systems
Alleasing Group	John Deere Financial
ANZ Asset Finance	Kemp Strang
Ashurst Australia	King & Wood Mallesons
Australian Structured Finance	Komatsu Corporate Finance
Bendigo Bank Leasing Division	KPMG
BMW Australia	Macpherson + Kelley Lawyers
BOQ Finance (Australia)	Macquarie Leasing
Bynx Australia	Marubeni Finance (Oceania)
Caterpillar Financial Australia	Mercedes-Benz Financial Services
CHP Consulting	National Australia Bank
Cisco Systems Capital (Australia)	Norton Rose Fulbright Australia
Classic Funding Group	PACCAR Financial
Clayton Utz	Pepper Australia
CNH Industrial Capital Australia	Realtime Computing
Colin Biggers & Paisley	Ricoh Finance
Commercial Asset Finance Brokers Assoc.	Service Finance
Commonwealth Bank of Australia	Sharp Finance
De Lage Landen	Selfco Leasing
DibbsBarker	Sofico Services Australia
FlexiGroup	St. George Bank
Fuji Xerox (Finance) Australia	Suncorp
Genpact	SunGard Asia Pacific
Henry Davis York	Thorn/RR Australia
Herbert Smith Freehills	Toyota Finance Australia
Holman Webb Lawyers	Traction Group
HP Financial Services	Volvo Finance
IBM Global Financing	Westpac
Insyston	White Clarke Asia Pacific
	Xeberg

March 2017

## **AFLA MEMBER COMPANIES**

**Alphabet Australia**

**Avis Budget Group**

**Custom Fleet**

**East Coast Car Rentals**

**Europcar Australia & NZ**

**Fleetcare**

**FleetPartners**

**Hertz Australia**

**LeasePlan Australia**

**McMillan Shakespeare Group**

**ORIX Australia**

**Qfleet**

**sgfleet / nlc**

**Smartgroup**

**Summit Fleet Leasing & Management**

**Thrifty Australia & NZ**

**Toyota Fleet Management**

December 2016

**DIFA MEMBERS**

**Bank of China  
Bank of Queensland  
Bendigo Debtor Finance  
Classic Funding Group  
HSBC Bank Australia  
Moneytech  
Scottish Pacific Debtor Finance  
St. George Bank  
Thorn Trade & Debtor Finance  
Westpac Banking Corporation**

**Associate Members**

**Cashflow Funding Limited  
Lock Finance NZ  
Pacific Invoice Finance NZ  
Scottish Pacific Debtor Finance NZ**

**Affiliate Members**

**ClarkeKann Lawyers  
DLA Piper Australia  
Euler Hermes  
FTI Consulting  
Hall Chadwick  
Hermes Data Systems  
HPD Software Asia Pacific  
Lowe Lippmann  
Polczynski Lawyers  
Trace Personnel  
Gregory Clayton, Barrister & Solicitor**

**March 2017**